UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

HIEU TRUONG, Plaintiff, vs. CHER YAO CHEN, M.D., of Oregon State Hospital, Defendants.	**No. 03:10-cv-00558-HU** **FINDINGS & RECOMMENDATION ON MOTION FOR SUMMARY JUDGMENT**

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Plaintiff appearing *pro se*

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HUBEL, M.J.:

The plaintiff Hieu Truong brings this action against the defendant Cher Yao Chen, M.D., for damages resulting from an injury Truong suffered while he was a patient at the Oregon State Hospital ("OSH" or "the Hospital"), where he had been sent for evaluation of his ongoing complaints of severe headaches. According to the plaintiff, he was in the recreational yard at the Hospital when a falling tree limb struck him in the head, causing him to suffer "permanent injury to his spine and brain that cause frequent serious headaches, and vertigo." Dkt. #8, Amended Complaint, ¶ 34. Truong claims Dr. Chen was deliberately indifferent to his serious medical needs, and his failure to treat Truong's head trauma properly "constituted an unnecessary and wanton infliction of pain . . . resulting in a permanent physical injury and disability now and forever to be suffered by [Truong]." *Id.*, ¶ 35.

On March 7, 2011, Dr. Chen filed a motion for summary judgment, a supporting brief, and three supporting declarations. Dkt. ##23-27. On April 6, 2011, Truong moved for a 90-day extension of time to respond to the defendant's motion for summary judgment, citing his limited access to legal materials, limited time to speak with a legal assistant, requirement that he write all pleadings and other documents by hand, and "frequent unbearable headaches and nausea." Dkt. ##29 & 30. His motion was unopposed by the defendant, Dkt. #31, and the motion was granted, with a response deadline set for July 7, 2011. Dkt. #32.

On July 8, 2011, Truong filed a second motion for extension of time, this time requesting 180 days to respond to the defendants' motion. Dkt. #33. As grounds for his motion, Truong stated he had been unable "to do discovery motions" and was "unable to properly respond to defendant's motion," and he continued to have "health issues" which he attributed to the injury giving rise to this action. Dkt. #34. The court granted the motion in part and denied it in part, extending the response deadline to September 1, 2011, and notifying Truong that the deadline would not be extended further absent a showing of extraordinary cause. The court further notified Truong that if he relied on health issues for any further requests to extend the response deadline, then the motion would have to be supported by a doctor's statement. Dkt. #35. The docket for this case shows a copy of the court's order was mailed to Truong the same date (i.e., July 8, 2011). Truong failed to file a response to the defendant's motion for summary judgment.[1]

On December 22, 2011, Truong filed a new motion for a six-month extension of time to respond to the summary judgment motion. Dkt. #40. Truong again cited "health issues" as a basis for the motion, with no supporting doctor's statement. He also cited lack of time "to do discovery motions." The court finds Truong has failed to show good cause for a further extension of time, and **denies** the motion. Accordingly, the court will proceed to consider the defendant's motion for summary judgment.

[1]On October 21, 2011, Truong attempted to file discovery requests with the court. The documents were returned to Truong with a letter noting Local Rule 5-2. *See* Remark/Staff note dated 10/21/11.

UNDISPUTED FACTS

Because Truong has failed to respond to the defendant's motion, the court considers the defendant's properly-supported assertions of fact to be undisputed for purposes of the motion. *See* Fed. R. Civ. P. 56(e)(2). The defendant states the following facts:

- Plaintiff, while incarcerated in the county jail, suffered chronic headaches. Plaintiff was admitted to the Oregon State Hospital on March 28, 2008, where he continued to suffer chronic headaches. Declaration of [Dr. Brian] Little Paragraph 11; Complaint Paragraph 9.
- On June 15, 2008, a tree branch landed on Plaintiff's head. Complaint Paragraph 11.
- After the incident, Plaintiff's skin was intact, no redness or swelling was visible, and his pupils were equal, round, and reactive to light. Plaintiff complained of a tender spot on his head. Declaration of Little, Paragraph 8.
- Plaintiff was taken to see Dr. Chen, who was acting as a "covering physician." Dr. Chen examined the Plaintiff and ordered that x-rays be taken. Those x-rays later revealed nothing out of the ordinary. Declaration of Little, Paragraph 8; Declaration of Chen, Paragraph 2.
- Soon after the x-rays were received, on June 26, 2008, Plaintiff was transferred back to Marion County custody, where he apparently continued to experience headaches. Complaint Paragraph 19; Declaration of Little Paragraph 12.
- The Department of Human Services, Office of Investigations and Training reviewed the incident and found no patient abuse. Exhibit 1 to Declaration of [Assistant Attorney General Justin Emerson] Kidd.
- Dr. Brian Little, Chief of Medicine at Oregon State Hospital, reviewed the entire medical file and found Dr. Chen's care to be "completely appropriate," finding that the Patient's presenting symptoms did not require an M.R.I. Declaration of Little Paragraph 8.
- Dr. Little further found that Mr. Truong's headaches did not result from the tree branch incident. Declaration of Little, Paragraph 11.

Dkt. #24, p. 3.

SUMMARY JUDGMENT STANDARDS

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). In considering a motion for summary judgment, the court "must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial." *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002) (citing *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996)).

The Ninth Circuit Court of Appeals has described "the shifting burden of proof governing motions for summary judgment" as follows:

> The moving party initially bears the burden of proving the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. *Id.* at 325, 106 S. Ct. 2548. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. *Id.* at 324, 106 S. Ct. 2548. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The non-moving party must do more than show there is some "metaphysical doubt" as to the material facts at issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 528 (1986). In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor. *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505. In determining whether a jury could reasonably render a verdict in the non-moving party's favor, all justifiable inferences are to be

> drawn in its favor. *Id.* at 255, 106 S. Ct. 2505.

In re Oracle Corp. Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010).

Even when a summary judgment motion is unopposed, the motion must be denied if the moving party fails to meet the party's burden to show the absence of any genuine issue of material fact. *See Sheridan v. Trickey*, slip op., No. 10-06034-AC, 2010 WL 5812678, at *2 (D. Or. Dec. 16, 2010) (Acosta, M.J.) (citing *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 950 (9th Cir. 1993)).

DISCUSSION

Dr. Chen characterizes Truong's claim as an allegation that the doctor was deliberately indifferent to his medical needs by "(1) ordering x-rays, when [Truong] would have preferred an M.R.I.; and (2) failing to explain the results of the x-ray to the patient." Dkt. #24, p. 1. Dr. Chen argues Truong has offered nothing more than his lay opinion that the doctor's care was constitutionally inadequate, while Dr. Chen has offered the declaration of Dr. Brian Little, the Chief of Medicine at OSH, who reviewed the medical record and found Dr. Chen's care to be "completely appropriate." Dkt. #23, p. 2; *see* Dkt. #26, ¶ 8.

Dr. Chen argues that even if Truong were able to show any medical deprivation, he cannot show Dr. Chen was aware of, but disregarded, the risk, if any, of failing to order an M.R.I. Dkt. #23, p. 2; Dkt. #24, pp. 7-9. He further argues that even if Truong could show a medical deprivation, and that the doctor was aware of the risk of the deprivation, Dr. Chen still would be

entitled to summary judgment on the basis of qualified immunity. Dkt. #23, p. 2; Dkt. #24, p. 13. Because I find Truong has failed to show an Eighth Amendment violation, I do not reach the defendant's qualified immunity argument.

To prevail on his Eighth Amendment claim, Truong must show the defendant was deliberately indifferent to his serious medical needs. *See Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). The test for deliberate indifference was explained by the *Jett* court as follows:

> In the Ninth Circuit, the test for deliberate indifference consists of two parts. *McGuckin v. Smith*, 974 F.2d 1050 (9th Cir. 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc). First, the plaintiff must show a "serious medical need" by demonstrating that "failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *Id.* at 1059 (citing *Estelle [v. Gamble]*, 429 U.S. [97,] 104, 97 S. Ct. 285[, 291, 50 L. Ed. 2d 251 (1976)]). Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. *Id.* at 1060. The second prong - defendant's response to the need was deliberately indifferent - is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference. *Id.* Indifference "may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." *Id.* at 1059 (quoting *Hutchinson v. United States*, 838 F.2d 390, 392 (9th Cir. 1988)). Yet, an "inadvertent [or negligent] failure to provide adequate medical care" alone does not state a claim under § 1983. *Id.* (citing *Estelle*, 429 U.S. at 105, 97 S. Ct. 285).

Jett, 439 F.3d at 1096. Thus, even if Truong could show Dr. Chen was negligent, that would be insufficient for liability. Moreover, a mere "difference of opinion does not establish deliberate

indifference." *Padgett v. Kowanda*, slip op., No. CV-08-87-HU, 2010 WL 4638871, at *15 (D. Or. Aug. 12, 2010) (Hubel, M.J.) (citing *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)).

The facts in the present case contradict Truong's allegation that Dr. Chen's response to Truong's medical need was deliberately indifferent. In Dr. Chen's capacity as a "covering physician," he was not even the doctor who ordered Truong's treatment. Dr. Chen evaluated Truong, and "ordered x-rays for the medical clinic or the attending physician to review." Dkt. #27, Decl. of Cher Yao Chen, ¶ 3. "Consequently, Mr. Truong was not in [Dr. Chen's] care when his x-ray results came in." *Id.*, ¶ 4.

Even if Truong had been under Dr. Chen's care, Dr. Little has offered his professional opinion that Truong's condition did not warrant an M.R.I. There was no visible damage to Truong's skin or skull other than some redness and tenderness. According to Dr. Little, "blunt force trauma severe enough to cause brain injury would have left some visible damage on the patient's skin or skull." Dkt. #26, Decl. of Dr. Brian Little, ¶ 9. Furthermore, Truong's x-rays were unremarkable. *Id.*

Dr. Little also opines that Truong's headaches are not the result of his injury from the falling tree branch. Dr. Little notes Truong complained of headaches on six occasions between March 22 and April 2, 2008. Truong was admitted to the Hospital for evaluation of his headaches, and while there, prior to the tree branch incident, he complained of headaches on twelve occasions between April 10 and May 25, 2008. Although Truong complained of a headache immediately after being hit by the falling branch, he did not complain of a headache the following day. *Id.*, ¶ 11(a)-

(c). He also did not display any neurological symptoms following the incident, which Dr. Little states "would usually be apparent after a head injury which resulted in chronic headaches." *Id.*, ¶ 11(d). Dr. Little concludes it is his "professional opinion that the [falling branch] event neither caused new headaches nor exacerbated [Truong's] existing headaches." *Id.*, ¶ 13.

With regard to Truong's complaint that Dr. Chen failed to explain the x-rays to him or to consult with him regarding his care, even if that were true, it would not result in a constitutional violation. In any event, Dr. Chen was not present when Truong's x-ray results came in, nor was Truong under Dr. Chen's continuing care.

The medical records and other documents submitted by Truong with his Amended Complaint fail to constitute evidence from which a jury reasonably could render a verdict in Truong's favor. The defendant has met his burden to show that there are no genuine issues of material fact for trial, and the defendant's motion for summary judgment should be granted.[2]

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due by **January 24, 2012.** If no objections are filed, then the Findings and Recommendations will go under advisement on that date. If objections are filed,

[2]The defendants requested oral argument on their motion for summary judgment. Because the motion is unopposed, the issues are straightforward, and oral argument would not assist the court in ruling on the motion, the request for oral argument is denied.

then any response is due by **February 10, 2012.** By the earlier of the response due date or the date a response is filed, the Findings and Recommendations will go under advisement.

IT IS SO ORDERED.

Dated this 6th day of January 2012.

/s/ Dennis J. Hubel

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Dennis James Hubel
Unites States Magistrate Judge